STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF COLDWATER,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 151051

Court of Appeals No. 320181

Branch County Circuit Court
No. 13-040185-CZ

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RESPONSE OF PLAINTIFF-APPELLEE CITY OF COLDWATER TO DEFENDANT-APPELLANT CONSUMERS ENERGY COMPANY'S APPLICATION FOR LEAVE TO APPEAL

STATEMENT OF APPELLATE JURISDICTION

Appellee City of Coldwater concurs with Appellant Consumers Energy Company that this Court has jurisdiction under MCR 7.301(A) to review by appeal the decision of the Court of Appeals issued January 6, 2015.

COUNTER-STATEMENT OF ORDER FROM WHICH THE APPEALS WERE TAKEN AND RELIEF SOUGHT

Appellant Consumers Energy Company seeks leave to appeal from a published decision of the Court of Appeals. (Ex 1.)

As set forth in this Brief, the result reached by the Court of Appeals is fundamentally correct and should not be disturbed by this Court. However, an erroneous statement of this Court in *Great Wolf Lodge of Traverse City LLC v Public Service Commission,* 489 Mich 27; 744 NW2d 155 (2011) has led to unintended consequences in the municipal utility arena and should be corrected either summarily or by granting leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Michigan Public Service Commission Rule 411 (Mich Adm Code, R 460.3411) applies only to those utilities over which the MPSC has jurisdiction to regulate. Municipal utilities are authorized by the constitution and are expressly excepted by statute from regulation by the MPSC. Was the Court of Appeals correct in determining that Rule 411 is irrelevant and is thus inapplicable to the municipal utility of the City of Coldwater in this cases?

The trial court would answer "Yes."

The Court of Appeals would answer "Yes."

Defendant-Appellant Consumers Energy Co. answers "No."

Plaintiff-Appellee City of Coldwater answers "Yes."

II. Did the Court of Appeals correctly determine that MCL 124.3(2) does not preclude the City of Coldwater from providing electric service to the customers at issue?

The trial court would answer "Yes."

The Court of Appeals would answer "Yes."

Defendant-Appellant Consumers Energy Co. answers "No."

Plaintiff-Appellee City of Coldwater answers "Yes."

III. Should this Court, in the context of these appeals, correct certain erroneous language in its prior opinion in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27 (2011), in order to clarify the conduct of utilities and to promote certainty?

The trial court did not answer the question.

The Court of Appeals did not answer the question.

Defendant-Appellant Consumers Energy Co. seeks leave to appeal.

Plaintiff-Appellee City of Coldwater answers "Yes."

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I. INTRODUCTION

Plaintiff-Appellee City of Coldwater ("Coldwater") commenced an action for declaratory relief against Consumers Energy Company ("Consumers") in the Branch County Circuit Court ("circuit court") after Consumers insisted that it had the exclusive right to provide electric service to a 6.2 acre parcel acquired by the Coldwater Board of Public Utilities ("CBPU") in Coldwater Township, located adjacent to and just outside of Coldwater. CBPU intends to use the parcel for a new water tower, waste water lift station, and electrical substation.

Consumers asserted that a rule of the Michigan Public Service Commission ("MPSC"), Mich Adm Code, R 460.3411 ("Rule 411"), gives Consumers the exclusive right to provide all electric service to these facilities in perpetuity. Consumers further relies upon this Court's decision in *Great Wolf Lodge of Traverse City v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011). That case held that under Rule 411(11), the first utility ever to provide service to a premises obtains the exclusive and perpetual right to provide all service to that premises in the future. Coldwater disputes Consumers' claim because, among other things, a municipally-owned utility, such as CBPU, is not regulated by the MPSC. Rule 411, by its own terms, regulates only competitive disputes between *MPSC-regulated* utilities. Accordingly, it is Coldwater's the position that Rule 411 has no application here. The circuit court agreed, and the Court of Appeals correctly affirmed.

Competitive disputes involving a municipal utility such as CBPU and an MPSC-regulated utility such as Consumers are governed by statutes, not by rules of the MPSC. Under Michigan law, CBPU, a municipal utility, is permitted to provide electric service anywhere in areas adjacent to the city except as prohibited by law. The only such prohibition is set forth in

MCL 124.3(2),[1] which precludes service by a municipal utility operating outside the municipality to a customer already receiving service from another utility without the other utility's consent. A similar provision, MCL 460.10y(2) precludes service by an MPSC-regulated utility to a customer already receiving service from a municipal utility.

In addition to its claim under Rule 411, Consumers alleges that CBPU is also precluded from providing service to Coldwater's new facilities by MCL 124.3(2). The circuit court disagreed, holding that the new facilities (which have not yet been constructed) were not already receiving servicing from Consumers. The Court of Appeals affirmed.

Coldwater's facilities were not customers of Consumers (they still do not exist) and they were not already receiving service from Consumers. Accordingly, under law, Coldwater is permitted to provide electric service. The Court of Appeals after extensive review reached the correct result in this case and confirmed the right of Coldwater to serve. In the ordinary situation, leave to appeal should be denied.

However, a single paragraph in this Court's *Great Wolf Lodge* decision, 489 Mich 27, has created considerable discord in the utility sector. And although the Court reached the correct result in the *Great Wolf Lodge* case, the reason given for the decision is wrong (and contrary to at least seven statutes), and ostensibly gives an administrative rule (Rule 411) priority over the constitution and multiple statutes. Prior to the *Great Wolf Lodge* decision, there were few if any legal issues involved in competitive disputes between regulated utilities and municipal utilities. A small portion of an otherwise correct decision in *Great Wolf Lodge* has "upset the apple cart,"

[1] A similar provision is included in the Home Rule City Act, MCL 117.4(f).

and led to this litigation. This Court should take the opportunity to "right the apple cart"—either by peremptory order or after plenary review.

II. CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS[2]

A. Material Facts

Coldwater is a home rule city, incorporated under MCL 117.1, *et seq*. The department of Coldwater designated to provide, produce, and distribute electric power is the CBPU. CBPU operates a municipal electric utility as authorized by Const 1963, art 7, § 24 and Chapter 15 of the Charter of the City of Coldwater. CBPU holds a franchise from Coldwater Township and provides electric power throughout the Township. Consumers is also franchised to provide electric service in Coldwater Township. As a municipally-owned utility, CBPU is entitled to provide service to customers outside the municipality's corporate limits unless the customer is already receiving that service from another utility which has not consented in writing. MCL 124.3(2).

On July 21, 2011, CBPU, acting on behalf of the City, purchased a 6.2 acre parcel at public auction. (See Complaint ¶ 16; Beckhusen Aff ¶ 5; Ex 3.) At the time of its acquisition by the City, the only structure located on the property was a vacant pole building. (Complaint ¶ 17; Beckhusen Aff 6; Ex 3.) An electric service drop owned by Consumers was connected to a meter on the building. (Complaint ¶ 17; Beckhusen Aff ¶ 7; Ex 3.) However, Consumers' electric service to the building had been discontinued at the request of the former owner, Deters Electric, on July 1, 2011 before Coldwater purchased the property. (Consumers' Ans to Coldwater's Disc Requests, Resp No. 7, dated June 6, 2013.) No electric power has been

[2] Referenced exhibits were attached to the pleadings and briefs below.

utilized at the property since it was acquired by the City on July 21, 2011. (Consumers' Answers to Coldwater's Req for Adm ¶ 1, dated June 6, 2013.)

The property was acquired by CBPU as a site for a new water tower, waste water lift station, and electric substation. (Beckhusen Aff ¶ 5; Ex 3.) By letter dated October 21, 2011, Coldwater's City Manager, Jeffrey Budd, inquired of Consumers whether it would have any objection to CBPU providing electric service to the new facilities. (Beckhusen Aff ¶ 10; Ex 3.) More than a year later, by letter dated December 4, 2012, Consumers responded:

> Under MPSC Rule 411 [R460.3411] and the Michigan Supreme Court decision of May 9, 2011 in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27 (2011), Consumers Energy is entitled to serve all the existing and future load on these premises. Therefore, Consumers Energy does not grant a waiver of its right to serve this site. [Bracketed material in original; emphasis in original (Beckhusen Affidavit ¶ 11; Ex 3; Consumers' December 4, 2012 Letter.)].

This lawsuit followed.

At CBPU's request, Consumers removed its electric facilities from the Coldwater property to enable the demolition of the pole building to make way for Coldwater's new public works facilities. (See Tr, Nov. 21, 2013 at 22.)

B. Material Proceedings

1. Circuit Court Proceedings

Coldwater filed its complaint for declaratory relief on April 2, 2013 with the circuit court, and Consumers filed its answer on May 1, 2013. Coldwater and Consumers filed cross-motions for summary disposition.

The circuit court issued a written decision and order on January 15, 2014 granting Coldwater's motion and denying Consumers' motion. (Op at 4; Ex 2.) The circuit court held that Rule 411 is inapplicable because the City intends to provide electric service to itself,

municipal utilities are expressly exempted from MPSC's jurisdiction, and this exemption extends to the City in its capacity as a customer. (Op at 3; Ex 2.)

The circuit court also determined that MCL 124.3(2) does not preclude CBPU's service because there is no customer currently receiving service on the property.

2. Court Of Appeals Proceedings

Consumers filed its claim of appeal on January 29, 2014. Coldwater moved to consolidate this appeal with a similar appeal in *City of Holland v Consumers Energy Company*, Ottawa Circuit Court No.: 12-002758-CZ. The Court of Appeals consolidated the two cases, and after argument, issued a single opinion on January 6, 2015. (Ex 1.) In general, Consumers raised two arguments: (1) the circuit court erred in failing to apply Rule 411 (COA Op at 10); and (2) CBPU will violate MCL 124.3 by providing service. (COA Op at 12; Ex 1.)

First, as to the Rule 411 arguments, the Court of Appeals determined that under express statutory language (MCL 460.6(1)), the MPSC "has no jurisdiction over municipally owned utilities . . . and thus cannot impose its rules upon municipally owned utilities such as Coldwater." (COA Op at 10; Ex 1.) Consumers further asserted, notwithstanding the statutory language, that this Court's decision in *Great Wolf Lodge* dictated a different result. The Court of Appeals rejected that notion, finding that the *Great Wolf Lodge* decision was distinguishable. (COA Op at 6-11; Ex 1.)

Second, as to the statutory argument, Consumers asserted that Coldwater violated MCL 124.3 by providing electric service to its existing customer. That statutory provision provides, in part, that a municipal corporation shall not provide "electric delivery service . . . to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." MCL 124.3(2). After analysis, the Court of Appeals concluded that "customer" means "the buildings and facilities served." (COA Op at 11-12; Ex 1.) According to

the evidence, at the time Coldwater acquired the property, "there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers," (*id.*) and thus Coldwater is entitled to provide service.

Consumers filed an application for leave to appeal on February 17, 2015.

III. THIS COURT SHOULD ISSUE A PREEMPTORY ORDER AFFIRMING THE COURT OF APPEALS DECISION BUT MAKING IT CLEAR THAT RULE 411(11) DOES NOT APPLY—DIRECTLY OR INDIRECTLY—TO MUNICIPAL UTILITIES

The holdings of the Court of Appeals in this case (as well as those of the circuit court) are correct and should not be reversed by this Court. However, the Court should use this opportunity clarify the erroneous references in the *Great Wolf Lodge* case which spawned this litigation. The problematic language in the *Great Wolf Lodge* case is as follows:

> Given that Cherryland [an MPSC regulated utility] is entitled to the benefit of the first entitlement in Rule 411(11), it is irrelevant that TCLP [Traverse City Light & Power] is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while limiting the right of the owner of the premises to contract with another provider for electric services.
>
> * * *
>
> Assuming arguendo that MCL 124.3 does not restrict TCLP from contracting with plaintiff to provide electric service, Rule 411(11) restricts plaintiff from seeking that service from any entity other than Cherryland. Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. Thus, MCL 124.3 has no application to the instant dispute. [*Great Wolf Lodge*, 489 Mich at 41-42.]

While this Court expressly recognized that a rule of the MPSC cannot regulate a non-jurisdictional municipal utility, the practical implication of the quoted language is precisely to the contrary. If landowners (*i.e.*, prospective customers) are bound by Rule 411(11), then

municipal utilities are effectively bound as well. Yet there is no statute that gives the MPSC jurisdiction to regulate the behavior in this regard of landowners, customers, prospective customers, or non-customers. Moreover, the so-called "right of first entitlement" was not conferred by the Legislature but rather by the MPSC. While the MPSC may have the authority to confer that preferred status on utilities it regulates at the expense of other regulated utilities, it has no authority to restrict the rights of municipal utilities or landowners over whom it has no jurisdiction.[3]

The Court of Appeals and the circuit court below struggled with the problematic references of this Court in *Great Wolf Lodge* because it was obvious to both courts (and each so stated during oral argument) that Rule 411(11) is not directly applicable to CBPU. Yet each court was confronted with the language from this Court strongly implying that Rule 411(11) is applicable. Both courts, as well as the circuit court in the *Holland* case, found ways to distinguish the facts here from those in *Great Wolf Lodge* so as not to contravene at least seven other statutes,[4] including one which actually gives municipal utilities the exclusive right to elect whether to operate under Rule 411.[5]

The issue of Rule 411(11)'s applicability to municipal utilities was not a significant issue in the *Great Wolf Lodge* case and was not fully developed by the parties.[6] Neither Consumers nor any municipal utility was a party in the case. The dispute was one between a customer,

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[3]Nor does the Rule itself purport to do so, as discussed *infra* at 12.

[4]*See* MCL 460.6, MCL 460.54, MCL 460.10y(2), MCL 460.10y(3), MCL 460.10y(11), MCL 117.4(f), MCL 124.3(2), and MCL 117.4(f).

[5]*See* MCL 460.10y(3).

[6]In the 33 pages the opinion occupies in the *Supreme Court Reports*, only one paragraph (most of it quoted above), occupying less than one page, even alludes to the issues involved in this case.

Great Wolf Lodge ("GWL"), and a regulated utility, Cherryland Electric Cooperative ("Cherryland") over the terms and conditions of existing electric service. GWL's complaint was filed pursuant to MCL 460.58 which provides the MPSC with authority to resolve disputes between regulated utilities and their customers. GWL requested the MPSC to resolve a contract dispute it was having with Cherryland and then to permit it to switch to either Consumers or Traverse City Light & Power ("TCLP") at the end of the contract term. Neither Consumers nor TCLP was seeking to provide such service and neither was a party in the case. This Court's conclusion that the customer could not be allowed to switch to TCLP was correct, not because of Rule 411(11) but because GWL was already receiving service from Cherryland and, therefore, TCLP was precluded by MCL 124.3(2) from providing it. In other words, this Court's conclusion was correct, but the reason it gave for it was not.

Nevertheless, Consumers has seized upon this Court's unfortunate statements in a single paragraph in an effort to gain an unfair and virtually complete competitive advantage over municipal utilities when they are operating outside of their municipal limits. As astutely observed by the Court of Appeals, a municipal utility, such as CBPU, does not meet the definition of "utility" under Rule 411 and "would thus never, ever, be the first utility to serve a customer under any circumstances." (COA Op at 7; Ex 1.) In other words, in areas where a municipal utility and an MPSC-regulated utility are both franchised to serve, the regulated utility would in all cases be entitled to provide service to all new load even if, in reality, the municipal utility was the first to serve.

The implications of this Court's references in *Great Wolf Lodge* are most serious. If Rule 411(11) applies to a municipal utility as the *Great Wolf Lodge* case clearly implies, it will ultimately mean the failure of at least some of Michigan's 41 municipal utilities. This is because

population is declining in many if not most of the cities that own electric utilities. If those utilities are unable to compete effectively for new load in suburban areas, then their customer bases will decline while their fixed costs will not. This will lead to higher rates which eventually will be unsustainable. (Amicus Brief of Michigan Municipal Electric Association, filed in Court of Appeals Docket No. 320181 at 6-7).

The implications for customers and prospective customers are also profound. There are 41 municipal utilities in Michigan that operate in over 100 jurisdictions. Many of these jurisdictions have issued franchises to more than one utility, thereby enabling some degree of customer choice. If Rule 411(11) is applicable, new load customers in those jurisdictions will be denied the opportunity to select service from municipal utilities even when legislatively-enacted statutes would permit them to do so.

The result reached by the Court of Appeals in this case was correct, but that court was powerless to undo this Court's erroneous reference to Rule 411(11)'s applicability to municipal utilities. Until that reference is clarified by this Court, additional unnecessary litigation will follow. This Court should reconsider that reference in this case and issue a preemptory order affirming the decision of the Court of Appeals but also making it clear that Rule 411(11) has no applicability—direct or indirect—in situations involving municipal utilities. In the alternative, the Court should grant leave to appeal limited to the application of Rule 411(11) to municipal utilities.

IV. STANDARD OF REVIEW AND OVERVIEW OF ELECTRIC UTILITY SERVICES

A. Standard Of Review

Questions of law are reviewed de novo. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 406; 751 NW2d 443 (2008). Likewise, rulings on motions for summary disposition and to

dismiss are subject to de novo review. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

B. Overview Of The Provision Of Electric Utility Services In Michigan

Electric utility service areas in Michigan are determined in part by cities, villages, and townships which have the exclusive authority to issue franchises granting utilities the right to conduct local business. Const 1963, art 7, § 29. Some municipalities have granted exclusive franchises, effectively giving a single utility a monopoly. Others, such as Coldwater Township here, have granted non-exclusive franchises to more than one utility.

In addition to a franchise, a utility regulated by the MPSC must obtain a certificate of convenience and necessity. MCL 460.501. Municipal utilities are not regulated by the MPSC, so they are not required to obtain a certificate of convenience and necessity. However, the reach of a municipal utility's service area is limited by the Constitution. Article 7, § 24 authorizes a city or village to supply electric power outside its corporate limits in an amount not exceeding 25% of that supplied within its corporate limits except as greater amounts may be authorized by law. The Legislature removed the restriction on the amount of electric power that a city or village may supply outside its corporate limits but imposed two additional restrictions: (1) a city or village may not, with limited exceptions, supply electric power beyond municipal units that are adjacent to the city or village; and (2) a city or village may not extend service to a customer already receiving that service from another utility. MCL 124.3 (cities and villages); MCL 117.4f(c) (home rule cities). These are the *only* limitations on the constitutional authority of a city or village to supply electric power outside of its corporate limits. Apart from these limitations, a city or village may serve any prospective customer in any municipal area in which it holds a franchise.

In municipal units where more than one utility is franchised to operate, the MPSC and the Legislature have enacted rules governing which utility may provide service to a particular customer. The MPSC's rule, Rule 411, governs competition between utilities that are regulated by the MPSC. The Legislature has enacted statutory provisions applicable when at least one of the competing utilities is a municipal utility. The statutory provisions prohibit extension of service to a customer already receiving service from another utility without the written permission of the other utility. MCL 124.3(2); MCL 460.10y(2).

Rule 411 and the statutory provisions do not apply in the same fact settings; in fact, they are mutually exclusive.[7] Rule 411 applies when both or all of the utilities are subject to the MPSC's jurisdiction. The statutory provisions apply when at least one of the utilities is a municipal utility.

Here, Consumers asserts that it has the exclusive right to serve here under both Rule 411 and the statutory provisions governing competition with and between municipal utilities. Coldwater argued to the contrary, and prevailed before the circuit court and the Court of Appeals.

V. ARGUMENT

A. Rule 411 Has No Applicability In These Cases

The Court of Appeals determined that Rule 411 does not apply to Coldwater. (COA Op at 10-11; Ex 1.) Consumers argues that the Court of Appeals erred in its reasoning. (Consumers' App at 9-16.) The decision of the Court of Appeals, however, was correct.

[7] For example, a new structure constructed on vacant property that in the past received electricity from a regulated utility would be required by Rule 411(11) to take service only from that regulated utility. On the other hand, under MCL 124.3 service by a different utility would be permissible because there is no customer already receiving service on the property.

As relevant here, Rule 411 provides that:

> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.

The rule established in subsection 11 of Rule 411 is sometimes referred to as the "rule of first entitlement" or the "premises rule." This Court has held that it gives the first utility serving the premises the exclusive, perpetual right to serve. *Great Wolf Lodge, supra*.

There are at least three reasons why Rule 411 is inapplicable here, each of which is discussed below.

1. Rule 411 Does Not Apply To CBPU For Three Reasons

a. Rule 411 Does Not Apply To Municipal Utilities Such As CBPU

By its own terms, Rule 411 applies *only* to utilities which are regulated by the MPSC. The term "utility" is defined as follows:

> As used in these rules:
>
> * * *
>
> (l) "Utility" means an electric company, whether private, corporate, or cooperative, that operates *under the jurisdiction of the commission*.

Mich Adm Code, R 460.3102(l) (emphasis added). The MPSC's rules further expressly state that they apply only to regulated utilities:

> (1) These rules apply to electric utilities that operate within the state of Michigan *under the jurisdiction of the public service commission*.

Mich Adm Code, R 460.3101(1) (emphasis added). As discussed below, municipal utilities are not within the MPSC's jurisdiction. Accordingly, on its face, Rule 411 does not apply here.

b. The MPSC Has No Authority To Regulate The Conduct Of A Municipal Utility

Administrative agencies have only that authority which is expressly granted by the Legislature. *Huron Portland Cement Co v MPSC*, 351 Mich 255, 262; 88 NW2d 492 (1958). There is no statute giving the MPSC jurisdiction or authority over municipally-owned utilities such as CBPU. To the contrary, at least three statutes expressly state that the MPSC does *not* have jurisdiction over municipal utilities. See MCL 460.6(1) ("The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility . . . ."); MCL 460.10y(11) ("As provided in section 6, the commission does not have jurisdiction over a municipally owned utility"); MCL 460.54 ("The power and authority granted by this act shall not extend to, or include, any power of regulation or control of any municipally owned utility . . . ."). Thus, rules of the MPSC have no applicability to municipal utilities.

The MPSC itself has recognized that Rule 411 is inapplicable in competitive disputes involving municipal utilities. In its Opinion and Order in *Great Wolf Lodge of Traverse City, LLC against Cherryland Electric Cooperative*, Case No. U-14593[8] (the Opinion and Order that was the subject of the appeal in *Great Wolf Lodge*, 489 Mich 27), the MPSC stated:

> Moreover, to the extent that this dispute centers on [Great Wolf Lodge's] right to seek service from [Traverse City Light & Power (a municipal utility)], Rule 411 is not directly applicable. Rule 411 does not purport to alter the rights or obligations of a non-jurisdictional utility. [*In the matter of the Complaint of Great Wolf Lodge of Traverse City against Cherryland Electric Cooperative*, Case U-14593, May 25, 2006 at p 17 (footnote omitted).]

[8] Available at http://efile.mpsc.state.mi.us/efile/docs/14593/0051.pdf.

It is clear enough from the text of the MPSC's rules that they do *not* apply to municipal utilities such as CBPU. But lest there be any doubt, the Legislature has also made it clear that Rule 411 does not apply *unless* the municipal utility unilaterally elects to be governed by MCL 460.10y(3). MCL 460.10y(3) provides that:

> *With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code, as in effect on June 5, 2000*. However, compliance with R 460.3411(13) of the Michigan administrative code is not required for the municipally owned utility. [Emphasis added.]

CBPU has not elected to be governed by Rule 411. Accordingly, Rule 411 is inapplicable here, and the Court of Appeals correctly so held.

c. Rule 411(11) Is Also Not Applicable To Coldwater As A Customer

Just as Rule 411(11) is not applicable to municipal utilities, it is also not applicable to landowners or other prospective customers, nor does it purport to be. The MPSC's rules expressly define and limit their scope to "electric utilities . . . under the jurisdiction of the public service commission." Mich Adm Code, R 460.3101(1).

Beyond that there is no statute or constitutional provision that gives the MPSC the authority to regulate the behavior of landowners such as Coldwater with respect to the selection of an electric service provider. Accordingly, there is no legal basis for this Court's statement that Rule 411(11) "limits[ ] the right of the owner of the premises to contract with another provider for electric service." *See, Great Wolf Lodge*, 489 Mich at 41.

d. Consumers' Claim That It Has The Exclusive Right Under Rule 411 To Serve Coldwater's Property Is Contrary To The Constitution

The right to own and operate a municipal electric utility is expressly conferred on cities and villages by the Constitution (Const 1963, art 7, § 24). The right of all municipal units to determine which utilities are authorized to provide electric service within specific areas within the municipality is also conferred by the Constitution of 1963. (Const 1963, art 7, § 29). Consumers' claims in this case are contrary to the constitutional authority of Coldwater as well as Coldwater Township.

First, Consumers' claim interferes with the authority vested in Coldwater by article 7, § 24 of the Constitution. Cities and villages may supply electricity outside their corporate limits, but their service areas are generally limited to municipalities adjacent to the city or village and they may not extend service outside their corporate limits to customers already receiving service from another utility. See generally Const 1963, art 7, §§ 24-25; MCL 124.3 and MCL 117.4f(c). These are the only limitations on the constitutional authority of Coldwater to supply electric power outside its corporate limits. Apart from these limitations, Coldwater may serve any prospective customer in Coldwater Township requesting such service.

Second, Consumers' claim interferes with the constitutional authority of Coldwater Township to determine which electric utilities may operate in its township. Article 7, § 29 of 1963 provides that a utility may transact local business only if the municipal unit grants it a franchise permitting it to do so. Franchises may be granted to operate in all or part of a township. Utility franchises are revocable at the will of the issuing municipal unit unless they are approved by electors for a finite term. MCL 460.602. A voted franchise cannot exceed 30 years. Const 1963, art 7, § 30.

Consumers has a revocable franchise to operate in Coldwater Township. That township has the constitutional right to terminate Consumers' authority to serve at any time. But under Consumers' faulty theory, CBPU (as owner of the property)—or any future owner of its land—is perpetually obligated to take electric power *only* from Consumers. Under Consumers' theory, the Township is stripped of its authority to revoke or non-renew Consumers' franchise. In substance and practical effect, Consumers would have a permanent franchise to operate in Coldwater Township. Under the Constitution, this cannot be.

Accordingly, the net effect of Consumers' argument is to (1) give legal preeminence to an administrative rule, over a statute, which is entirely improper (*Brown v Yousif,* 445 Mich 222, 231; 517 NW2d 727 (1994)); (2) strip Coldwater of its constitutional authority to provide electric service except where expressly precluded by statute; (3) strip Coldwater Township of its authority to issue or withhold utility franchises; and (4) deny CBPU the right to select the electric utility of their choice.

2. Consumers' Argument As To Duplication Of Services Has No Bearing On This Appeal

Consumers argues that the "fundamental purpose of Rule 411"—the avoidance of duplication of utilities—is undermined by the decision of the Court of Appeals. (Consumers' App at 13-15.) Putting aside for the moment the fact that the best way to avoid duplication is to establish a monopoly, this argument has no bearing here.

Consumers complains that the Court of Appeals decision will lead to unnecessary duplication of facilities. Not so. There will always be some duplication of facilities whenever a local jurisdiction franchises more than one utility. That is one of the trade-offs when a local jurisdiction such as Coldwater Township decides to allow its residents and businesses to choose electric suppliers on vacant land or when new buildings or facilities are constructed. Among the

purposes of both Rule 411 and MCL 124.3(2) is the minimization of duplication. But neither can completely prevent it. Under Rule 411, for example, two regulated utilities could be providing the same type of service to adjoining parcels using separate, duplicative facilities. Similarly, while MCL 124.3(2) precludes a different provider from constructing duplicate facilities to serve the same building or facility already served by another provider, it permits new electric facilities to be constructed if an existing building is replaced by a new building. But in such case, new electrical facilities—often upgraded facilities—must be installed no matter what provider does so.

In this case CBPU will not be duplicating existing infrastructure. CBPU intends to construct, among other things, an electric substation on the property. The substation will take high voltage electricity from the grid, reduce the voltage, and feed lower voltage into CBPU's existing distribution system. Some of that electricity will be used to power the other facilities on the property. Under these circumstances, it is Consumers, not CBPU that would be duplicating infrastructure because it would be constructing new facilities to deliver electric power to a site that already has electric power on it. That makes no sense at all.

On the issue of monopolies, Rule 411(11) reduces duplication by completely eliminating competition. Under the so-called "right of first entitlement," any parcel that was ever part of a larger tract that at any point in the past received electric service from a particular utility may only and forever receive service from that utility. This is so even if, as here, there has been a gap in service. Under Rule 411(11), the Rule dictates which utility will serve. As relevant here, this is completely contrary to the policy of Coldwater Township which has affirmatively chosen to allow competition in the Township. Under the statutory scheme, on the other hand, the customer

may choose its supplier as long as the buildings and facilities are not already receiving service from another utility. That evidently is why Consumers rejects the statutory system.

3. There Was Ample Basis To Distinguish The Facts In This Case From Those In *Great Wolf Lodge*

Had the courts below applied literally this Court's reference in *Great Wolf Lodge* to landowners being bound by Rule 411(11), the outcome of this case might have been different. But both the circuit court and the Court of Appeals perceived the difficulty of applying Rule 411(11) in a context in which it clearly does not apply. Accordingly, both courts—as well as the circuit court in the Holland case—distinguished *Great Wolf Lodge*. The Court of Appeals appropriately found that *Great Wolf Lodge* was "factually distinguishable." (COA Op 7-9, 12.) There is ample basis for it to have done so.

For example in *Great Wolf Lodge*, unlike here:

-- The dispute was between an MPSC regulated utility (Cherryland) and its customer over the terms and conditions of service.

-- An administrative complaint alleging that Cherryland was charging an illegal rate was filed with the MPSC pursuant to MCL 460.58 which authorizes the MPSC to resolve such disputes.

-- The customer voluntarily submitted to the jurisdiction of the MPSC.

-- The customer requested the MPSC to resolve its contract dispute with Cherryland and, upon termination of the contract, allow it to take service from either Consumers or TCLP, a municipal utility.

-- At the time the administrative complaint was filed, the customer was already receiving service from Cherryland and had been for three years; accordingly, MCL 124.3(2) precluded service from TCLP and Rule 411 precluded service from Consumers.

Thus, the facts of this case stand in sharp contrast to those in the *Great Wolf Lodge* case. Here, Coldwater (1) is not a customer of Consumers; (2) is not involved in a contract dispute with Consumers; (3) is not taking electricity under an MPSC tariff; (4) has not alleged that it is

being charged an illegal rate not approved by the MPSC; and (5) has not filed a complaint with the MPSC. In sum, the decision in *Great Wolf Lodge* is not controlling, and should not be applied here.

B. The Court of Appeals Was Correct In Its Holding That, Pursuant To MCL 124.3(2), CBPU Was Entitled To Provide Service

As the Court of Appeals and the circuit court below both determined, the proper framework for resolving this dispute is not Rule 411. Rather it is the statutory system adopted by the Legislature which is to be applied when a dispute involves a municipal utility. The Court of Appeals and the circuit court relied on MCL 124.3(2), which provides that:

> A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.

Provisions like MCL 124.3(2) are commonly referred to in the utility business as "no switch" rules. MCL 124.3 precludes a municipal utility from extending service to a customer of a regulated utility. A companion provision, MCL 460.10y(2), invokes the same rule in reverse by precluding a regulated utility from extending service to a customer of a municipal utility.

Two conditions must be present to preclude service. In the absence of consent, CBPU is prohibited from providing service (1) if there is a customer of another utility *and* (2) if that customer is "already receiving service." Here, neither condition is met. First, the facilities which Coldwater intends to construct (they do not now exist) are not, and never were, "customers" of Consumers. Second, the customers were not "already receiving" service from Consumers when CBPU began providing service. Because both conditions must be met in order to preclude CBPU from providing service, and because neither condition is met here, the Court

of Appeals and the circuit court correctly determined that CBPU was entitled to provide electric service. (COA Op at 12; Ex 1.)[9]

1. The Facilities To Be Served By CBPU Were Never Customers Of Consumers

MCL 124.3(2) contains no definition of the word "customer." For purposes of utility "no switch" rules, the term "customer" does not ordinarily refer to the occupant of the site or the person paying the utility bill. If it were otherwise, utility companies could be switched back and forth each time the owner or occupant changes.

In the context of utility "no switch" rules, the term "customer" ordinarily refers to the buildings and facilities being served.[10] This is, for example, how the term "customer" is defined in Rule 411.[11] It is also how the term is defined in MCL 460.10y(2), the companion provision to MCL 124.3(2) which provides that "customer" "means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service." The Court of Appeals correctly concluded that because both statutes share a

[9] Consumers seems to want this Court to focus on the second condition (whether there is current service) rather than the first condition (whether there is a customer), or, perhaps, to assume, that service is precluded if either condition exists. Here, the Court of Appeals determined that both conditions are present, but even if only one were present, service by the municipal utilities would be permissible.

[10] MCL 8.3a provides that:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; *but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning*. [Emphasis added.]

[11] Rule 411(1)(a) states: "'Customer' means the buildings and facilities served rather than the individual, association, partnership, or corporation served." Mich Adm Code, R 460.3411(1)(a).

common purpose, the same definition should be applied in both.[12] (COA Op at 11-12; Ex 1.) Accordingly, the Court of Appeals and the circuit court concluded that "customer" for purposes of MCL 124.3(2) means buildings and facilities.

In the Application pending before this Court, Consumers agrees that "customer" means the buildings and facilities. But Consumers is unwilling to accept the customary definition of the term "facilities." Consumers insists that in this case, "facility" means "the whole of the 6.2 acres purchased by Coldwater." Consumers' App at 17-18. To justify this position, Consumers relies on a single dictionary definition of the term "facility" that includes the word "place," while ignoring a multitude of other dictionaries that do not support its position.

In common usage the terms "facility" or "facilities" do not include preexisting, natural things like land, mountains, or lakes. As a multitude of dictionaries hold, "facilities" means things that are designed, built, created or established by people. [13]

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[12] Statutes having a common purpose should be read in harmony with each other in furtherance of that purpose. *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994). Here, MCL 124.3(2) and MCL 460.10y(2) have a common purpose: to prevent customer switching without consent. It would make little sense to have different definitions for the word "customer" depending solely on whether the serving utility is a municipal utility or a regulated utility. Accordingly, the definitions should be uniform; for purposes of MCL 124.3, the term "customer" should mean the buildings and facilities served just as it does in MCL 460.10y(2).

[13] "Facility" is overwhelmingly defined to require something that is built or created. It cannot merely be a "place." *Random House Webster's College Dictionary* (2005 ed), p 441 ("something designed, built, or installed to afford a specific convenience or service: a new research facility"); *Webster's Third New International Dictionary*, p 812-813 ("something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"); *Merriam-Webster's Collegiate Dictionary* (11th ed), p 447 ("something (as a hospital) that is built, installed, or established to serve a particular purpose"); *Oxford American Dictionary* (3d ed), p 619 ("an establishment set up to fulfill a particular function or provide a particular service, typically an industrial or medical one"); *Webster's Ninth New Collegiate Dictionary*, p 444 ("something (as a hospital) that is built, installed, or established to serve a particular purpose"); *American Heritage College Dictionary* (4th ed), p 498 ("something created to serve a particular function").

As the Court of Appeals determined:

> Under both MCL 124.3 and Rule 411(11)(a), a "customer" means the buildings and facilities served. "Building" is defined in *The American Heritage Dictionary* (4th ed.) as "something that is build, as for human habitation; a structure." "Facilities" is the plural of "facility" which is defined as "something created to serve a particular function." *The American Heritage Dictionary* (4th ed.). Under the relevant definitions, there was no customer already receiving the service from Consumers. According to the evidence, Coldwater purchased the property at a public auction on July 21, 2011. The prior owner of the property had requested that electrical service be discontinued to the property (which contained a pole barn) on June 28, 2011. Thus, at the time Coldwater acquired the property and south to demolish the pole barn building and provide electrical service to potential newly built buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers. [COA Op at 12; Ex 1.]

Consumers would have this Court redefine "customer" to mean the premises instead of the buildings and facilities. "Premises" is not the term utilized by the legislature. There is no statutory or principled basis for Consumers' position. Consumers' argument concerning the proper interpretation of MCL 124.3(2) was properly rejected by the Court of Appeals.

2. No Customer Was Already Receiving Service When CBPU Extended Its Service

The second reason that there is no violation of MCL 124.3 here is that at the time Coldwater purchased the property and continuing until now, there has been no electric service on the property. The pole building formerly on the property has been demolished and the property is currently vacant.

The plain meaning of the phrase customers "already receiving the service" is that the customer must *currently* be receiving service in order for the municipal utility to be precluded from serving.[14] The Court of Appeals explicitly acknowledged and gave effect to this statutory language, stating "[n]otably, the phrase '"already receiving"' is in the present tense." (COA Op at 4, 11; Ex 1.) The test is not whether the regulated utility served in the recent past, still has equipment on the property, or professes a willingness to resume service. The regulated utility must actually be providing electric power to the buildings and facilities. That is what the statute says and that should be the end of the matter.

On page 18 of its Application, however, Consumers complains that the Court of Appeals interpretation "provides a clear path for municipal utilities that want to take customers from the first serving utility." According to Consumers, the municipal utility need only wait "until the prior utility had shut off its service, even if just for a moment." *Id.*

Consumers is seeing ghosts. MCL 124.3(2) has been in existence in substantially its present form for over forty years. There is no evidence in this case that any municipal utility has ever utilized phony service interruptions to take customers from other utilities. And that is certainly not what happened here.

Consumers' service was disconnected on July 1, 2011 after the former owner of the property went out of business and requested Consumers to terminate service. This occurred before the city purchased the property. Consumers' lines and poles were subsequently removed from the property to permit demolition of the pole barn. The property is now vacant and there has been no electric service for nearly four years.

[14] The phraseology in the companion provision, MCL 460.10y(2), is to like effect. MCL 460.10y(2) refers to a customer "receiving the service from a municipally owned utility."

Service was disconnected not as a ploy to enable CBPU to take a customer from Consumers but because the former owner of the property ceased using it for his business.

Accordingly, the court of Appeals' decision with respect to the application of MCL 124.3(2) is correct and there is no need for this Court to review it.

VI. CONCLUSION AND RELIEF REQUESTED

This lawsuit would not have been filed but for the clear implication in a single paragraph in the *Great Wolf Lodge* case that Rule 411 effectively is applicable to municipal electric utilities. Consumers seized on the Court's language quoted on p 6 of this Response and used it as the original basis for objecting to electric service being provided by CBPU. And Consumers will no doubt rely on it in the future as a means to convince litigation-leery prospective customers not to take service from an available municipal utility.

Prior to the *Great Wolf Lodge* case, there was no one in the electric utility industry who thought that Rule 411 had any application to municipal utilities. It was understood and accepted that service extensions by MPSC-regulated utilities were governed by Rule 411 and that competition between MPSC-regulated utilities and municipal utilities was governed by MCL 124.3(2) and MCL 460.10y(2). The system worked for many years and it worked without encountering the market disruptions and wasteful duplication forecast by Consumers in this case.

If this Court revisits the issue of Rule 411's applicability to municipal utilities, we believe it will agree that a mistake was made in the *Great Wolf Lodge* case and will correct the implication that Rule 411 applies indirectly to municipal utilities.

Accordingly, the City of Coldwater respectfully requests that this Court issue a peremptory order affirming the decision of the Court of Appeals but making it clear that Rule 411 has no applicability—direct or indirect—to municipal utilities such as CBPU. In the alternative, the Court should grant Consumers request for leave to appeal but limit review to the Rule 411 question.

Respectfully submitted,

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